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No. 87-224

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE DOW CHEMICAL COMPANY, *et al.*,
Petitioners,

v.

MICHAEL F. RYAN, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Cornish F. Hitchcock
(Counsel of Record)
Alan B. Morrison
David C. Vladeck
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

John Catterson
Mark A. Harmon
Peter Sills
Bondy & Schloss
6 East 43rd Street
New York, N.Y. 10017
(212) 661-3535

Barton F. Stichman
Vietnam Veterans of America
Legal Services
2001 S Street, N.W., Suite 700
Washington, D.C. 20009
(202) 686-2599

Attorneys for Respondent Vietnam Veterans of America

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CASILLAS PRESS INC. – 1717 K STREET NW WASHINGTON DC 20036 – 223-1220

QUESTION PRESENTED*

Did the court of appeals err in declining to overturn the ruling of the trial judge who, in the course of approving a class action settlement, ordered disclosure of non-confidential records produced by the defendants during the litigation, as a means of assuring that class members and the public would understand and have confidence in the fairness of the settlement?

*All parties were identified in the petition. Respondent Vietnam Veterans of America is a not-for-profit New York corporation which has no parent companies, subsidiaries or corporate affiliates.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Vietnam Veterans of America ("VVA") respectfully asks the Court to deny the petition for a writ of certiorari in this case, the opinion in which is now reported at 821 F.2d 139 (2d Cir. 1987). Although petitioners name both the class representatives and VVA as respondents, VVA raised the issues presented here in the district court and litigated them there and on appeal. We are advised that the Agent Orange Plaintiffs' Management Committee, on behalf of the class respondents, supports denial of the petition; thus, this will be the only brief in opposition.

STATEMENT OF FACTS

Respondent VVA is a non-profit corporation with 35,000 members in 320 chapters across the country, and

some of its members are members of the plaintiff class. VVA has been recognized by the Veterans Administration as a veterans' service organization under 38 C.F.R. § 14.628 (1986), and it operates a claims service program for veterans dealing with the VA and provides other services to Vietnam veterans.

The petition's recitation of the facts is very sparse. Because the facts are vital to an understanding of the decisions below and why certiorari should be denied, this brief will set forth the facts in sufficient detail to enable the Court to put the petition in the proper context.

At issue here are two protective orders in the "Agent Orange" litigation, conducted in the United States District Court for the Eastern District of New York, in which a class of Vietnam veterans claimed that they were injured by their exposure to certain herbicides manufactured by petitioners (the "chemical companies"). The first of these orders, issued by District Judge Pratt on 6 Feburary 1981 (Pet. App. 1a-6a), allowed the chemical companies to designate as "confidential" any record produced in discovery which contained "developmental, business, research or commercial information" (Pet. App. 1a). This order regulated how these "confidential" records were to be used or disclosed, required parties to return or destroy these documents when the case was over, and specified how parties could seek to modify the order (Pet. App. 2a, 4a, 6a).

The second order was a blanket seal on all discovery materials, which was orally imposed in May 1982 by the Special Master who was supervising discovery (Pet. App. 7a-8a). Two months later, CBS sought access to non-classified, non-confidential records; the Special Master denied that motion on 14 October 1982 and formally entered this seal (Pet. App. 7a-14a; 22a-25a). In finding "good cause" for this order, the Special Master cited the

complexity of the case, the need to expedite discovery, the emotionalism surrounding the case, and the sensitive nature of some records (Pet. App. 22a). He stated that "as discovery progresses and fundamental disputes are resolved, it may become desirable to lift this order," adding that it would be re-examined after 120 days upon the motion of any party (Pet. App. 14a) and that it was not intended to displace the procedures set out in the order regulating "confidential" commercial records (Pet. App. 24a). CBS appealed this ruling to Judge Pratt, who approved and adopted the blanket seal (Pet. App. 15a-25a).

Although the petition fails to mention this fact, the district court twice lifted the blanket seal to permit disclosure of sealed records. On 21 June 1983, after Judge Pratt had granted summary judgment to several chemical companies based on the "government contract" defense, he unsealed the papers and exhibits filed in connection with those motions. *In re "Agent Orange" Product Liability Litigation,* 98 F.R.D. 539, 546-48. On 31 October 1983, Chief Judge Weinstein (who had assumed responsibility for the case) unsealed depositions of government employees and all agency records that were not covered by a more specific protective order. *In re "Agent Orange" Product Liability Litigation,* 99 F.R.D. 645. Both opinions found that the public's interest in access to these records outweighed the risk of possibly prejudicial publicity to the companies, 98 F.R.D. at 546-48 and 99 F.R.D. at 648-50. The latter opinion noted that "despite defendants' dire predictions," the release of hundreds of documents submitted in connection wtih the summary judgment motions "appeared to have had little, if any, effect on the conduct of the litigation to date." 99 F.R.D. at 650.

The petition also fails to note that a large number of the documents at issue here were not simply produced in dis-

covery, but were organized and filed with the clerk in anticipation of their use at trial. On 23 April 1984, two weeks before the trial was scheduled to begin, attorneys for both sides filed their pretrial submissions and exhibit lists, along with all of the documents and depositions that they contemplated using as exhibits at trial. While the exhibit lists were publicly filed, the exhibits themselves — which would be made public under the decision below — were filed under seal and kept in a locked room in the courthouse until after the settlement was announced, when each party retrieved its exhibits (Pet. App. 33a-34a & n.3).

On 7 May 1984, several hours before the trial was set to begin, the parties reached a tentative settlement, with both sides reserving the right to litigate against the United States. The Stipulation of Settlement signed that day did not require that discovery materials be returned to the chemical companies, although such a provision was inserted as paragraph 12 of the formal settlement agreement dated 11 June 1984, which (like the earlier stipulation) was expressly made subject to the court's approval under Rule 23(e), Fed. R. Civ. P. That paragraph also provided that if the plaintiffs sued the government within one year from the date of the agreement, their attorneys were not obliged to return the documents until 30 days after the conclusion of those proceedings (Pet. App. 69a-70a). *See In re "Agent Orange" Product Liability Litigation,* 597 F. Supp. 740, 862-66 (E.D.N.Y. 1984).

Because the case was a class action which involved many parties, Chief Judge Weinstein held eleven days of fairness hearings at five cities around the country. At the fairness hearing in New York on 9 August 1984, respondent VVA raised the issue of access to the sealed records and was instructed by the judge to file a motion, returnable before Magistrate Scheindlin (who had assumed responsibility for

supervising discovery and other matters), which VVA did on 31 August 1984 (Pet. App. 70a).[1]

On 25 September 1984, before VVA's motion was argued, Chief Judge Weinstein issued an opinion which concluded that the settlement was reasonable. *In re "Agent Orange" Product Liability Litigation, supra,* 597 F. Supp. at 746-48. He noted that a number of veterans had complained about a possible "coverup" of information about the hazardous effects of Agent Orange; while he found this concern to be "understandable," he said it was "not an appropriate reason for rejecting the settlement." *Id.* at 769-70. Responding to that concern, however, he directed that until the Agent Orange case was finally concluded, no documents were to be destroyed, and the parties were expected to file at the courthouse all depositions and other papers obtained in discovery (including all documents previously filed) in conformity with instructions to be provided by the Magistrate. *Id.*

The Magistrate heard argument on VVA's motion to unseal all discovery records which did not contain commercially "confidential" information, and VVA was supported by the Agent Orange Plaintiffs' Management Committee and Victor J. Yannacone, an attorney for some of the plaintiffs. On 17 December 1984, the Magistrate issued an opinion lifting the protective orders, but allowing the chemical companies to maintain a seal on any records for which "good cause" existed (Pet. App. 28a-62a). The petition to this Court never explains the reasons why this order was entered or why it was affirmed by the district judge

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[1] Although VVA was denied formal intervenor status in the case, it was allowed to litigate the merits of these sealing orders, as have nonparties in other cases involving access to court records or proceedings. *E.g., Press-Enterprise Co. v. Superior Court,* 106 S. Ct. 2735 (1986); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982).

and the court of appeals. However, such a recitation will demonstrate why the petition is essentially a complaint that the district court improperly exercised its discretion, which is not a basis for this Court to grant review.

The Magistrate's opinion began with Rule 5(d), Fed. R. Civ. P., under which "All papers after the complaint required to be served upon a party shall be filed with the court," although a court may excuse parties from filing "depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto." Here, a local court rule exempted parties from filing these discovery materials; thus, apart from the trial exhibits filed in April 1984 and any exhibits filed in connection with pretrial motions, no discovery material had been filed with the clerk (Pet. App. 33a-35a).

The Magistrate thus ordered the parties to file all discovery materials with the clerk, citing the advisory committee notes accompanying the 1980 amendment to Rule 5(d) (Pet. App. 52a) and noting that this procedure was explicitly endorsed by Judge Mansfield, then Chairman of the Advisory Committee on Civil Rules, who wrote that "a judge would not be expected to excuse parties from filing materials in any case in which the public or the press has an interest" and that "should the public importance of the material not appear until after filing had been excused, it is expected that the judge, upon motion of the press or other interested persons, would order the parties to file the documents for inspection" (Pet. App. 35a n.4).

The Magistrate then considered whether the protective orders should remain in effect. After weighing the competing interests, she found "compelling" the argument that class members, other veterans, the press and the public generally "should have an opportunity to see what evi-

dence each party had discovered in preparation for trial" (Pet. App. 51a). She noted that litigants are normally entitled to review discovery documents, that the settlement affected the legal rights of tens of thousands of veterans who had no opportunity to evaluate the strength or weakness of their case, and that lifting the protective orders would allow class members to "understand the need for and properly evaluate the settlement" (Pet. App. 51a). Citing the concerns and opposition to the settlement voiced during the fairness hearings, she stated: "Continued dissatisfaction, suspicion and unease among the veterans and their families will surely continue in the absence of full disclosure" (Pet. App. 53a). She noted the public interest in the Agent Orange case, adding that a full public record might help Congress in deliberating about any victim compensation legislation (Pet. App. 55a).

The Magistrate found these concerns sufficient to outweigh the chemical companies' claims that they had bargained for secrecy in settling the case and that culling the records in order to identify "confidential" records would be burdensome. The opinion noted that the secrecy element of the settlement was conditional and subject to the district court's approval. Second, the agreement expressly contemplated that the sealed records might be disclosed in a later suit against the government. Third, the case was settled immediately prior to trial, after the parties had culled many of the documents for use at trial. Finally, since expediting discovery was the principal "good cause" for the blanket seal, the opinion expressed concern that the companies' argument could lead to a "permanent exception to the good cause requirement for cases with voluminous records, which would make Rule 26(c) meaningless" (Pet. App. 49a-51a).

The chemical companies appealed to Chief Judge Weinstein. After briefing and oral argument, he affirmed the Magistrate "for the reasons stated in her opinion and by the court on the record" and ordered the opinion "published as a Memorandum and Order of this court," but stayed its effect pending the outcome of appeals from his approval of the settlement (Pet. App. 27a).

The companies then appealed to the Second Circuit, which heard this appeal in tandem with all other Agent Orange appeals. In a series of nine opinions issued on 21 April 1987 and reported at 818 F.2d 145, the court unanimously upheld the district court's handling and settlement of the case in every major respect. On 10 June 1987, the panel unanimously affirmed the order at issue here in an opinion written by Judge Miner and joined by Judges Van Graafeiland and Kearse (Pet. App. 63-81a).

The court of appeals rejected the companies' claim that the order impermissibly altered an integral part of the settlement agreement, citing the "ample indications" throughout the case that the protective orders might be lifted, the companies' awareness that the records might be introduced in other cases, and the fact that even if they reached agreement with the plaintiffs' attorneys, other parties might intervene to obtain access to the documents (Pet. App. 73a). The panel added that even if the order could be regarded as a "modification," it was at best "incidental" and within the district court's discretion in disposing of this case (Pet. App. 74a-75a).

The court also upheld the district court's interpretation of Rules 5(d) and 26(c) (Pet. App. 75a-79a), as well as the decision unsealing these records. The court noted that some of its decisions had held that a seal could be modified only if there existed an "extraordinary circumstance" or "com-

pelling need" for access. The court did not decide whether that standard or a less demanding standard should be used in this case because it held that the district court's ruling was a proper exercise of its discretion, even under that rigorous standard urged by the chemical companies (Pet. App. 79a-81a).

The court of appeals stressed that the protective orders were intended to be temporary and limited to the pretrial phase of the case, adding that they were warranted in light of the "unusual scope" of the Agent Orange litigation and were properly lifted thereafter (Pet. App. 81a). The court labelled "disingenuous" the companies' argument that the modification order would be burdensome, noting that they had already culled the records prior to trial and that any inconvenience "certainly is outweighed by the enormous public interest in the Agent Orange litigation and the compelling need for class members and non-class members alike to evaluate fully the efficacy of settling this litigation" *(id.)*.

The panel denied the companies' petition for rehearing on 17 July 1987, and no judge on the court requested a vote on their suggestion that the case be reheard *en banc* (Pet. App. 82a).

REASONS WHY THE WRIT SHOULD BE DENIED

The writ should be denied because the decision below does not conflict with any decision of this Court, nor is the question presented sufficiently important to warrant review.

1. The chemical companies argue (at 7-8) that the decision below conflicts with *Seattle Times Co. v. Rhinehart,* 467 U.S. 20 (1984), but there is no conflict. *Seattle Times* held that a pretrial protective order, entered on a proper

showing of "good cause" under a state law identical to Rule 26(c), was not a prior restraint which violated the First Amendment. By contrast, this case involves a district court's determination, pursuant to Rule 26, that the "good cause" for secrecy which existed at earlier phases of the case was no longer present and that the seals should be lifted, as indeed they had been on two prior occasions. *Seattle Times* thus allows a district court to enter a protective order when there is "good cause" for doing so, but, as both lower courts recognized, that case does not prevent a court from modifying that protection later on (Pet. App. 37a-38a, 75a-76a).

If anything, *Seattle Times* counsels against granting the petition. As this Court stated, the "trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery" and has "substantial latitude in fashioning protective orders." *Id.* at 36 (footnote omitted). Petitioners' real complaint here is that they disagree with the district court's conclusion about how the competing interests should be balanced, yet that disagreement affords no basis for granting their petition.

2. Apart from the *Seattle Times* point, petitioners repeat a number of arguments which were unsuccessfully raised below, none of which warrants granting the petition.

The petition states (at i) that this case presents the question of whether Rules 5(d) and 26(c) allow a non-party to "examine any discovery materials in any case, without any showing of need, regardless of whether the case has any merit, and regardless of the time of the request." Respondent's Statement of Facts makes it clear, however, that this "question" is not presented here.

As the court of appeals noted, the proposed settlement was unsatisfactory to many class members and actually

"increased the controversy surrounding the case." 818 F.2d at 150. The district court recognized this fact during the fairness hearings, and it entered this disclosure order in an effort to bolster the plaintiffs' and the public's confidence in the fairness of the settlement. That was surely a proper concern in this case. Nor can it be said that the motion was made by some "non-party" with no regard to "time." The unsealing motion was made by a national veterans organization whose members include class members, and VVA raised this issue at the first available opportunity. Nor does this case involve access to "any" discovery material, since the district court explicitly allows records to be withheld on a showing of "good cause."

Thus, even if the Court should be concerned with the issues which the petition tries to raise, this case is a poor vehicle for addressing them. The decision below was grounded in the facts presented here, and hence the argument that the decision will somehow unleash frivolous lawsuits aimed at extracting information from defendants (Pet. at 9-11) is overstated if not wholly speculative. Moreover, district courts have ample means to prevent abuses of the judicial process by imposing sanctions on parties and lawyers who act improperly.

The petition also argues (at 11-13) that the decision below misinterpreted Rules 5(d) and 26(c), but it cites no authority to contradict the lower courts' legal analysis. It also fails to mention that a number of these records were previously filed with the clerk and that the refiling order is consistent with the notes of the Advisory Committee and the advice of its Chairman. The district court was thus on solid ground when it ordered the filing of these documents, along with other "depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto," which Rule 5(d) specifies should normally be filed.

The petition focuses on the fact that the refiling order covers not only these documents, but also records produced in response to Rule 34 production requests, which would normally not be filed under Rule 5(d). The court of appeals acknowledged that these Rule 34 materials "technically may not fall within the terms of Rule 5(d)," but found "no abuse of the discretion in the district court's order in light of the district court's broad supervisory authority in class actions" (Pet. App. 78a). The court found "little sense" in allowing "access to documents requesting inspection of discovery materials and documents facilitating the inspection of discovery materials, without allowing access to the discovery materials themselves" *(id.)*, adding that the companies could still withhold specific records upon a showing of "good cause" (Pet. App. 78a-79a). While this decision may raise a question of whether, on the facts of this case, the district court properly ordered the filing and unsealing of non-confidential Rule 34 materials, that issue is at best a minor facet of the case and is not an important question of federal law which needs to be decided by this Court.

Petitioners also argue (at 13-15) that the decision below conflicts with other federal appellate decisions which require the moving party to demonstrate in some instances that an "extraordinary circumstance" or "compelling need" exists before a seal will be lifted. However, the appellate cases which they cite on this issue all come from the Second Circuit. The panel found no inconsistency with that court's prior decisions, and no member of the full court thought that the case deserved *en banc* review. Petitioners cannot invoke this Court's jurisdiction to resolve what they perceive to be an intra-circuit dispute.

3. Petitioners' final claim is largely a rehash of its earlier points. They argue (at 15-17) that the Court should

exercise its supervisory power because the decision below will impede discovery and discourage settlements. The point is answered in large part by the record here: the district court repeatedly informed the parties that the protective orders were temporary and lifted them on two prior occasions without detriment to the case moving towards trial and eventual settlement.

Nor can it be said that the decision below "has so far departed from the accepted and usual course of judicial proceedings" that this Court should intervene. S. Ct. Rule 17.1(a). Indeed, the Manual for Complex Litigation warns district judges to "be wary of approving" settlement proposals requiring that sealed records be returned to the parties which produced them, citing the "potential effect [of such orders] on other litigants and courts," but adding that it is proper to continue a seal on any commercially sensitive documents. Manual for Complex Litigation, Second § 23.22, at 170 (West, 1985) (footnote omitted). That is precisely what the district court did here.

Nor is there any reason to believe that the decision below will discourage settlements. Unsealing motions turn on the facts of each case. The district court was persuaded to modify these seals based on the facts here, and other courts will decide similar motions based on the facts there. Moreover, the ruling here was unanimously upheld by a federal appeals court which has taken a leading role in efforts to encourage settlements and reduce litigation. Surely, if the Second Circuit was satisfied with the district court's handling of this matter, this Court need not exercise its supervisory power to review that judgment.

Finally, we note that three years have come and gone since VVA first raised this issue. Petitioners have never suggested that this unsealing order would impel them to walk away from the settlement, a fact which suggests that

the court of appeals was correct in its assessment that this issue was, at best, an "incidental" element of the overall settlement (Pet. App. 74a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Cornish F. Hitchcock
(Counsel of Record)
Alan B. Morrison
David C. Vladeck
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

John Catterson
Mark A. Harmon
Peter Sills
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